STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
HOLBROOK, P.J., AND McDONALD AND SAAD, JJ.

PITTSFIELD CHARTER TOWNSHIP,

Plaintiff-Appellee,

v.

WASHTENAW COUNTY,

Defendant-Appellant,

and

CITY OF ANN ARBOR,

Defendant.

/

Supreme Court Docket No. 119590

Court of Appeals Docket No. 219480

Washtenaw County Circuit Court
No. 98-9690-CE

BRIEF ON APPEAL – APPELLANT WASHTENAW COUNTY

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Pursuant to MCR 7.301 and MCR 7.302, from a decision of the Court of Appeals filed June 15, 2001 reversing a decision of the Washtenaw County Circuit Court and holding "that Washtenaw County's right to use its property is subject to, and not exempt from, Pittsfield Township's zoning regulations." Leave to appeal was granted April 30, 2002.

QUESTION PRESENTED

IS THE COUNTY SUBJECT TO A TOWNSHIP ZONING ORDINANCE WITH RESPECT TO THE SITING AND CONSTRUCTION OF A HOMELESS SHELTER OWNED BY THE COUNTY?

The Circuit Court answered "No."

The Court of Appeals answered "Yes."

Defendant-Appellant Washtenaw County contends the answer is "No."

STATEMENT OF FACTS

The facts in this case are largely undisputed, and are set forth in the pleadings and other papers filed in the matter.

Defendant-Appellant Washtenaw County owns property in Pittsfield Charter Township which is zoned I-1 (Limited Industrial) under Plaintiff-Appellee township's zoning ordinance. (29a)[1] The county and the City of Ann Arbor proposed jointly to finance, construct and operate a homeless shelter on the property (29a), a use not specifically permitted in the I-1 District by the ordinance. (29a) The property contains an existing building housing offices for a number of the county's social service providers, including a community mental health office, a branch of the state's Family Independence Agency, and an office administering veterans' benefits. (66a–67a)

The Township Supervisor informed the County Administrator by letter of October 10, 1997 that the county's proposed use of the industrially-zoned property was contrary to the zoning ordinance, and requested that the county advise the township why the county claimed to be exempt from the ordinance. (38a) The County Administrator responded by letter of December 10, 1997 basing the county's claim for exemption on, among other things, the test for exemption as set forth in *Dearden v Detroit*, 403 Mich 257, 269 NW2d 257 (1978), which is legislative intent, and the fact that the legislature has given counties the power to determine the site of a county building and prescribe the time and manner of erecting such buildings. Although claiming exemption, the County Administrator's letter indicated that "the County will be pleased to share its plans for designing the proposed homeless shelter

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[1] Page numbers followed by "a" refer to pages in Appellant's Appendix.

with the Township and receive any input you have. This has been our past practice when locating and constructing other county buildings in the Township and has always resulted in amicable relations between the County and the Township." (39a-41a)

On May 21, 1998, the township filed a Complaint for Declaratory Judgment and Injunction (28a), seeking a declaration that the township zoning ordinance applied and that the county and city must conform to the zoning ordinance with respect to the property, and also seeking an injunction against the county's announced intention to disregard the zoning ordinance and proceed with construction of the homeless shelter.

At the time of filing the complaint, the township obtained an Order to Show Cause why a preliminary order of injunction should not issue. A consent order to adjourn the hearing was entered on May 28, 1998, and a more detailed Stipulation and Order was entered on June 16, 1998 pursuant to which it was agreed that preliminary injunctive relief was not required for reasons set forth therein. (45a) Two subsequent stipulated orders extended the time for defendants to respond to the complaint.

Neither defendant filed an answer to the complaint. Rather, on January 15, 1999 the county filed a motion for summary disposition under MCR 2.116(C)(8) which was concurred in by the city. (64a) Also on January 15, 1999 the township filed a motion for summary disposition under MCR 2.116(C)(10), alleging that it was entitled to judgment as a matter of law on the issue as to whether defendants are subject to the zoning ordinance. (50a)

Answers to the motions for summary disposition were filed, followed by replies to the answers. Following oral argument on February 17, 1999, the Circuit Court issued its written Opinion and Order dated February 17, 1999, filed February 19, 1999, granting the county's

motion for summary disposition and denying the township's motion for summary disposition. (12a)

On March 2, 1999, the township filed a Motion for Rehearing and/or Amendment of Opinion and Order. (105a) On April 22, 1999 the Circuit Court issued a written opinion and order denying reconsideration. (17a) On May 13, 1999 the township filed a claim of appeal. Oral argument was held in the Court of Appeals on February 6, 2001, before Holbrook, P.J., and McDonald and Saad, JJ., and on June 15, 2001 the Court of Appeals issued its opinion reversing the decision of the Trial Court. (20a) Washtenaw County filed its application for leave to appeal to the Supreme Court on June 28, 2001, and leave was granted on April 30, 2002.

ARGUMENT

THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DETERMINATION THAT WASHTENAW COUNTY WAS EXEMPT FROM PITTSFIELD TOWNSHIP'S ZONING ORDINANCE WITH RESPECT TO THE SITING AND CONSTRUCTION OF A HOMELESS SHELTER OWNED BY THE COUNTY.

A. STANDARD OF REVIEW

The question of statutory interpretation involved in this case is reviewed de novo as a matter of law. *Capital Region Airport Authority v Charter Twp of DeWitt*, 236 Mich App 576, 601 NW2d 141 (1999).

B. SUMMARY OF ARGUMENT

This case involves the ability of a county to construct a homeless shelter on property in a township which is not specifically zoned for that use, but which is already the site of several other county and state offices not specifically permitted by the township zoning ordinance. The Circuit Court, correctly applying the principles enunciated by the appellate courts in *Dearden v City of Detroit*, 403 Mich 257, 269 NW2d 257 (1978) and its

progeny, determined that the county was not subject to the township zoning requirements with respect to the siting and construction of the shelter. The Court of Appeals, in reversing the Circuit Court, gave insufficient attention to the specific terms of the statute spelling out the powers of county governments, and placed undue weight on general provisions in statutes dealing with township zoning and planning. If the Supreme Court were to reconsider the *Dearden* test and adopt the balancing test adopted by certain other jurisdictions, the county's decision would nonetheless be upheld.

C. THE *DEARDEN* TEST: LEGISLATIVE INTENT AS EVIDENCED BY RELEVANT STATUTORY LANGUAGE.

All parties to this matter agree that the present test for determining exemption of a governmental agency from the requirements of a township's zoning ordinance was enunciated by the Supreme Court in *Dearden v Detroit*, 403 Mich 257, 269 NW2d 257 (1978) and recently reaffirmed in *Burt Twp v DNR*, 459 Mich 659, 593 NW2d 534 (1999): "[t]he legislative intent, where it can be discerned, is the test for determining whether a government unit is immune from the provisions of local zoning ordinances." 403 Mich at 264. This exceedingly general test has, as the Court acknowledged in *Burt Township*, "proven to be difficult to apply." 459 Mich at 664, n.3. However, several other principles emerge from the controlling cases which provide additional guidance to courts confronted with claims of exemption:

(1) No specific verbal formula is required to establish that a governmental agency has exclusive jurisdiction over an activity and is thus immune from local zoning. As the Supreme Court recently observed in *Burt Township*:

> As an initial matter, we note that the *Dearden* Court found persuasive to its holding the fact that the

> statutes establishing the authority of the Department of Corrections explicitly stated that the department had "exclusive jurisdiction" over prison facilities. *Dearden, supra* at 265. Accordingly, Burt Township has argued that the absence of such a term in the NREPA is controlling. We reject this argument. While the presence of such terms as "exclusive jurisdiction" certainly would be indicative of a legislative intent to immunize the DNR from local zoning ordinances, we decline to require that the Legislature use any particular talismanic words to indicate its intent. The Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive. 459 Mich at 669.

(2) The fact that the applicable zoning enabling act does not specifically exempt an activity from local zoning control is not conclusive proof that the legislature did not intend to exempt the activity from such control. The correctional facilities determined to be exempt in *Dearden* were not specifically exempted under the City and Village Zoning Act, MCL 125.581 et seq, MSA 5.2931 et seq. While the Supreme Court in *Burt Township*, in holding a DNR boat launch to be subject to township zoning, did advert to the fact that certain other uses (drilling of oil and gas wells, state licensed residential facilities) were specifically exempted under the Township Zoning Act MCL 125.271 et seq, MSA 5.2963(1) et seq, this fact was a makeweight and not the principal basis for the Court's conclusion. 459 Mich at 670-71.

(3) There is apparent significance in a statement by the legislature that a governmental agency may choose the manner in which to conduct an activity. The Supreme Court noted in *Burt Township*:

> The DNR places great emphasis on the mandatory nature of the duties expressed in the NREPA, as evidenced by the Legislature's repeated use of the term "shall," as well as the fact that the DNR is given the "power and jurisdiction" to manage and control lands under the public domain. However, we are not persuaded that the Legislature, in directing that the DNR engage in certain governmental functions, intended that the DNR be authorized to do so in any manner it chooses. 459 Mich at 669-670 (footnote omitted; emphasis added).

Unlike the statutes upon which the DNR relied in *Burt Township*, the statute upon which Washtenaw County relies in the present case specifically authorizes the county to determine the manner in which it will act. The statute which empowers a county board of commissioners to site and construct county buildings (hereinafter referred to as the "County Commission Act" or "CCA") grants these powers in two separate subsections: MCL 46.11(b), MSA 5.331(b) authorizes a county board to "[d]etermine the site of, remove, or designate a new site for a county building," while MCL 46.11(d) MSA 5.331(d) authorizes a board to "[e]rect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them." (emphasis added)

(4) The public policy of preventing local zoning interference with the provision of important governmental services remains relevant to a determination of an agency's exempt status. The Supreme Court made this clear in *Dearden* when it observed that "the underlying policies of the general correctional system could be effectively thwarted by

community after community prohibiting the placement of certain penal institutions in appropriate locations." 403 Mich at 266. Nothing in the more recent *Burt Township* decision alters the relevance of this factor; indeed, while the Court ultimately found the DNR subject to local zoning regarding boat launches, it acknowledged the accuracy of Judge White's view in her Court of Appeals dissent that the underlying purpose of a legislative grant of authority to an agency is appropriately considered in determining whether the agency is exempt. 459 Mich at 668-69 n.10. Two recent Court of Appeals decisions subsequent to the Supreme Court's *Burt Township* decision lend support both to the proposition that no talismanic verbal formula is necessary to render an agency exempt from local zoning and to the proposition that such exemption can appropriately be based on potential interference of local zoning with fulfillment by the agency of its statutorily-determined objectives. In both *Captial Region Airport Authority v DeWitt Twp*, 236 Mich App 576, 601 NW2d 141 (1999), and *Bingham Twp v BLTD Railroad Corp*, (on remand), 237 Mich App 538, 576 NW2d 731 (1999), rev'd on other grounds, 463 Mich 634 (2001) exemption from local zoning was upheld.

Even with the general test of *Dearden* amplified in the foregoing way, there will continue to be debate concerning legislative intent in any case where the legislature has not been crystal clear in the language it has chosen--and precedent demonstrates that the legislature is rarely crystal clear. Nonetheless, the Circuit Court in the present case correctly

analyzed county authority under the relevant provisions of the zoning enabling act and the county commission statute. The Court of Appeals, on the other hand, disregarded the guidelines previously established by the Supreme Court for discerning legislative intent, including the principle that no specific verbal formula is necessary to establish exemption. After correctly noting that the test for determining exemption from the requirements of a township's zoning ordinance was enunciated by in *Dearden* and reaffirmed in *Burt* and, most recently, *Byrne v State of Michigan*, 463 Mich 652; 624 NW2d 906 (2001), the Court of Appeals went on to state: "If the Legislature meant to say that the county's power to site and use its property is plenary (not subject to but exempt from any legal restrictions), the Legislature could have easily and expressly said no. It did not and we conclude that it is neither permissible nor appropriate for us [sic] to graft such a plenary gloss on this statutory provision." Here, the Court of Appeals does precisely what the Supreme Court said it should not do--require a specific verbal formula as a condition of exemption from local zoning. It would have been equally logical for the Court of Appeals to have said that if county projects were to be subject to local zoning, the legislature should have explicitly said so in the applicable zoning enabling act.

D. UNDER THE *DEARDEN* TEST, THE COUNTY'S SITING AND CONSTRUCTION DECISIONS ARE EXEMPT.

The township understandably has attempted to equate this case with the cases which found governmental agencies subject to local zoning, but in doing so, it has minimized or ignored what is most relevant in the statutes and decisions which govern this case. Moreover, the township has advanced a number of arguments which only serve to confuse the issue: (1) the township has noted that the County Commission Act has been amended, but fails to acknowledge that the crucial provisions not only remain intact but have been

strengthened; (2) the township has suggested that the City of Ann Arbor is involved in the financing of the proposed homeless shelter and does not operate under the same statute which arguably exempts the county from zoning, but the township does not dispute that it is the county which owns the property, has determined the site of the shelter, and will own the shelter; (3) the township has argued that township zoning regulations supersede county zoning regulations, but fails to acknowledge that no county zoning regulation is involved in this case, and (4) the township has suggested that the trial court committed reversible error by commenting favorably on Judge White's dissent in *Burt Township*, which one would have thought a judge had the right to do, particularly since his comments were made only after he had engaged in his own careful and independent analysis of the statutes. The relevant statutes and judicial decisions firmly support the county's position.

(1) The applicable statutes.

All parties would agree that the statutory provisions which must be examined by the court are found in the County Commissioners Act, MCL 46.11 et seq, MSA 5.221 et seq, the Township Zoning Act, MCL 125.271 et seq, MSA 5.2963(1) et seq, and the Township Planning Act, 125.321 et seq, MSA 5.2963(101) et seq. (For the sake of convenience, the abbreviations TZA, CCA and TPS will be used to refer, respectively, to these statutes.)

Under the CCA, boards of commissioners are not only given authority to "[p]urchase or lease, for a term not to exceed 20 years, real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county" (MCL 46.11(a), MSA 5.331(a)), but are given explicit power to "determine the site of, remove, or designate a new site for a county building" (MCL 46.11(b), MSA 5.331(b)) and "prescribe the time and manner" of

The statute upon which Washtenaw County relies in the present case specifically authorizes the county to determine the manner in which it will act. The CCA authorizes the county board to "[e]rect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them." (MCL 46.11(d), MSA 5.331(d); emphasis added) None of the cases in which the appellate courts have found governmental agencies subject to local zoning involve statutory language this explicit in granting the arguably-exempt control over the manner in which it carries out its statutorily-authorized functions.

The Court of Appeals in this case quotes the language of the CCA, but merely describes it as "comprehensive legislation dealing with counties," and fails to recognize the import of the grant of very specific authority to a county to prescribed the time and manner of erecting county buildings. In upholding the ability of a township to apply its zoning ordinance in a manner which would destroy the ability of the board of commissioners to "determine the site...of a county building" and to "erect the necessary buildings for jails, clerk's offices, and other county buildup, and prescribe the time and manner of erecting them" (emphasis added), the Court of Appeals rendered these statutory provisions nugatory. If the legislature had only intended a county to be able to acquire county buildings, and not specifically to determine the site of those buildings, it would have been unnecessary for the legislature to enact subsections (b) and (d) of the statute, and it would have been sufficient to enact subsection (a), which authorizes a county board to "purchase or lease...real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county." The Supreme Court has relied upon "the fundamental rule of construction that every word of a statute should be given meaning and no word should be treated as surplusage

or rendered nugatory if at all possible." *Feld v R&C Beauty Salon*, 435 Mich 352, 364, 459 NW2d 279 (1990). The decision of the Court of Appeals violates this "fundamental rule."

The Circuit Court appropriately noted the significance of the fact that the legislature, in recently amending the CCA, explicitly limited the power of a board of commissioners to determine the site of a county building only when any law required that the building be located at the county seat. As the Circuit Court correctly observed, "The fact that there is only one stated limitation, is evidence that the Legislature intended no other restriction on the authority of the County." The Court of Appeals entirely ignored this recent statutory amendment. Not surprisingly, the township has been highly critical of this aspect of the Circuit Court's opinion, contending that if the legislature had intended this to be the only limitation on a county's authority, it could have used a word like "sole" or "only" to evidence this intent. While the legislature could have used such terms, the circuit court committed no error in analyzing the language which the legislature in fact used. As previously noted, the Supreme Court made clear in *Burt Township*, no specific verbal formula is necessary to exempt a governmental agency from local zoning, and short of requiring a specific verbal formula, the legislature did an adequate job in this case of defining a county's authority regarding its buildings sufficiently broadly in the CCA so as to exempt an exercise of that authority form local zoning.

The township, in prior arguments, has made much of the fact that when the CCA was amended in 1998, two provisions were eliminated which Washtenaw County initially cited in the letter to Pittsfield explaining why it regarded itself as exempt from township zoning in locating and constructing of a homeless shelter. (39a) These provisions made specific reference to the purchase of a "real estate necessary for the erection of buildings for the

support of the poor of that county and for a farm to be used in connection with that support," and to the necessity of a 2/3 vote for the determination of the site of a county building. The legislative history of this amendment (see Exhibit A), however, in no way suggests that the legislature had any intent to undermine the authority of a county over either the problems of the poor or the siting of county buildings; rather the legislature merely intended to clean up certain statutory provisions which were not only archaic but had been confusing to county boards in the conduct of their business.

In addition to its failure to acknowledge the importance of the specific provisions of the CCA, the Court of Appeals placed undue weight on provisions of the TZA and TPA. First, the Court of Appeals refers to Section 28 of the Township Zoning Act (MCL 125.298, MSA 5.2963(28)), as well as Section 39 of the County Zoning Act (MCL 125.239, MSA 5.2961(39)) and states "that the provisions of the Township Zoning Act take precedence over provisions of other ordinances" and that "the provisions of the township's zoning are not subject to the county's zoning regulations." This statement, while true, is entirely irrelevant to the present case, since the county's decision to site the homeless shelter did not involve "other ordinances" and was not a decision taken pursuant to the county's zoning authority, but rather a decision pursuant to the county's specific authority to site its buildings. The Court of Appeals further stated:

> Moreover, read together, the Township Zoning Act and the County Zoning Act, along with the Township Planning Act provide a comprehensive statutory scheme which can be harmonized with the proposed zoning ordinance including any zoning maps to the county zoning commission of the county in which the township is situated for review and recommendation." MCL 125.280. The Township Planning Act also requires the township to submit its zoning plan to the county for its approval. ML 125.328. Further, the Township Planning Act requires the township planning commission to

> "consult, in respect to its planning, with...the county planning commission, if any..." MCL 125.326. Only then may the township adopt a zoning ordinance which implements the basic plan. If the county approves the basic plan, it may site its buildings and determine their use consistent with the township's zoning ordinance. That is, the county is not prevented from exercising its Section 11 powers; it merely exercises that power within a planning and zoning framework which the county planning commission has reviewed and approved. (Opinion, p. 7, footnotes omitted)

Here, the Court of Appeals appears to suggest that because township zoning ordinances and plans are subject to county review, a county can thereby preserve the ability to site its buildings during this review process. If this is in fact the implication of the Court of Appeals' opinion, it can be predicted with a high degree of certainty that townships would protest vigorously. Indeed, this question of statutory interpretation is another one which the Supreme Court would do well to consider in a future case.[2]

While the township, in briefing and arguing this matter in the Court of Appeals, quoted extensively from the TZA, noting a lengthy list of matters with which township zoning may be concerned, and a short list of matters with which township zoning may not be concerned, it remains the case--as was true in *Dearden*--that the failure of the legislatures specifically to exempt governmental activity from local zoning control under the applicable zoning enabling act does not compel the conclusion that the legislature did not intend to exempt the activity from local zoning. In this case, as in *Dearden*, the intent of the legislature can be gleaned more clearly from the specific language of the CCA than from the general language of the TZA or the TPA.

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[2] It might be noted that recent legislation dealing with township planning (PA 2001, No. 263) provides explicitly that review of township plans is advisory only, thereby undermining even further the suggestion of the Court of Appeals that review of township plans by county planning commissions is adequate to protect legitimate county concerns.

It might further be noted that the language of the TZA upon which the township has relied is even more general than the language upon which the Supreme Court relied when it determined that the DNR boat launches were subject to local zoning in *Burt Township*. In *Burt Township*, the Supreme Court noted that under the TZA, a township is authorized to regulate land development to meet citizen needs for "recreation," and that zoning ordinances shall be based on a plan designed, among other things, to "conserve natural resources." 459 Mich at 665-66. Further, the Court noted that under the Township Planning Act, MCL 125.321 et seq., MSA 5.2963(101) et seq., a township plan shall contain recommendations for, among other things, "waterways and water front developments." 459 Mich at 666. The township in this case can point to no language in the TZA which refers directly to township authority over a county building erected for a homeless shelter, but refers instead to township authority over a county building erected for a homeless shelter, but refers instead to township zoning authority under the TZA concerning "places of residence," "other uses of land," and "other public facilities." When viewed in conjunction with the specific provisions of the CCA, these general references in the TZA lend little support to the township's position.

(2) Recent Cases.

The township has contended that the authority granted to a board of commissioners under the CCA is in fact no different from the powers granted to the governmental agencies involved in *Addison Twp v Dept of State Police*, 220 Mich App 550, 560 NW2d 67 (1996), *Lutheran High School Ass'n v Farmington Hills*, 146 Mich 641, 381 NW2d 417 (1985), and *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich 103, 321 NW2d 855 (1982), cases in which local zoning regulations were held to be applicable, and the Court of Appeals erroneously adopted this conclusion. *Addison* is relevant to this case, since it

involved a communication facility which did not fall within the terms of the statute upon which the Department of State Police relied in claiming exemption. While *Cody Park* and *Lutheran High School* did involve statutory authorization for the agencies involved to locate and acquire sites for school facilities, these statutory provisions did not include specific authority to "prescribe the time and manner of erecting" these facilities, as is contained in the CCA concerning the location of certain buildings at the county seat. Only by disregarding these specific provisions of the CCA could it be concluded that *Cody Park* and *Lutheran High School* have any relevance to this matter.[3]

E. UNDER POSSIBLE ALTERNATIVES TO THE *DEARDEN* TEST, THE COUNTY'S POSITION SHOULD ALSO BE SUSTAINED.

As argued above, the language used by the legislature in the CCA should be viewed as sufficiently explicit to support the determination of the Circuit Court that under *Dearden*, the decision of Washtenaw County to construct a homeless shelter is exempt from the zoning regulations of Pittsfield Township. It has also been noted, however, that as the Court of Appeals acknowledged in the present case, discerning legislative intended often "a

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[3] It is interesting to note that in *Burt Township*, the Supreme Court made the following observation concerning *Cody Park*, *Lutheran High School*, and *Addison Township*: "We express no opinion on the results reached in these cases. However, we note that the decisions in *Cody Park Ass'n*, *Lutheran High School Ass'n*, and *Addison Township* have since been 'overruled' by subsequent legislative amendments of the statutes at issue in those cases." 459 Mich at 664, n.3. It may well be the case that the legislature simply clarified what it had intended from the outset and that the Court of Appeals had too narrowly construed the powers of the agencies involved. (The recent case of *Township of Northville v Schultz*, 247 Mich App 178, 635 NW2d 508 (2001) discusses the school statutes in their amended form.) Clan Crawford observes as follows in a supplement to his treatise Michigan Zoning and Planning: "The Supreme Court affirmation of the Court of Appeals decision in *Burt Twp v DNR*, at 459 Mich 659; 593 NW2d 534 (1999), means that legislative action will be required to prolong the established public policy of affording maximum public access to the waters of Michigan. It would seem that a lot of expensive litigation could be avoided by adoption of an act that would exempt all land use and development by the state or its agencies from local zoning control unless specifically provided otherwise in another statute. Crawford, Michigan Zoning and Planning, (3d Ed, January, 2000 Cumulative Supplement, p. ix)

task difficult under the best of circumstances." (22a). A recent article by Robert L. Brackenbury (former Pittsfield Township Trustee and now a judge of the Michigan Tax Tribunal) in the Public Corporation Law Quarterly, the journal of the Public Corporation Law Section of the State Bar of Michigan, "When is a Governmental Unit Exempt from or Subject to Local Zoning Regulations?" (Fall 2001, No. 10), a copy of which is appended to this brief as Exhibit B, comprehensively reviews the manner in which the courts of Michigan and other states have attempted to address this issue of exemption from local zoning regulation, and suggests that in the absence of a clear expression of legislative intent, it would be appropriate for courts to adopt a balancing approach, considering such factors as the nature of the agency seeking immunity, the kind of land use involved, the public interest to be served, the effect of the local regulation on the proposed land use, and the impact of exemption on local interests. Indeed, the author suggests that the Michigan Supreme Court in *Dearden* may implicitly have approved a balancing test by relying on the earlier New Jersey decision in *Rutgers, The State University v Piluso*, 60 NJ 142, 286 A2d 697 (1972). The author further suggests that it might be appropriate for agencies seeking exemption to demonstrate a willingness to cooperate with local zoning officials.

If the Court were to determine in the present case that the language of the CCA is insufficient to establish a clear legislative intent to exempt the county's decision to site and construct a homeless shelter from township regulation, and the Court were further to determine that use of a balancing test would be appropriate, the application of such a test to the facts of the case would support the decision of the Circuit Court. The proposed homeless shelter would serve an important public need, and, being located on a site which already

accommodates existing state and county governmental functions, would not cause any significant disruption of local land use patterns.[4]

A balancing approach would appropriately limit the ability of allowing local governments to thwart significant projects of county government which may be locally unpopular but which serve a broader public purpose. The homeless shelter involved in this case is only one example. The public policy of preventing local zoning interference with the provision of important governmental services remains relevant to a determination of an agency's exempt status. The Supreme Court made this clear in *Dearden* when it observed that "the underlying policies of the general correctional system could be effectively thwarted by community after community prohibiting the placement of certain penal institutions in appropriate locations." 403 Mich at 266. Nothing in the later *Burt Township* decision alters the relevance of this factor; indeed, while the Court ultimately found the DNR subject to local zoning regarding boat launches, it acknowledged the accuracy of Judge White's view in her Court of Appeals dissent that the underlying purpose of a legislative grant of authority to an agency is appropriately considered in determining whether the agency is exempt. 459 Mich at 668-69 n.10. The even more recent *Byrne* decision similarly notes the danger of local interference with projects of wider public significance. In the present case, the Court of Appeals took no note whatsoever of the distinct likelihood that the legislature, in allowing counties to site county buildings and determine the time and manner of erecting them, was

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[4] The township has argued in early pleadings that an affidavit of its former zoning administrator indicates that other land in the township is available for homeless shelter use. (113a) To the contrary, the affidavit indicates that homeless shelter use "is not specifically provided for in the ordinance" (emphasis added) but that the township zoning administrator might be able to interpret the ordinance as allowing a homeless shelter as a permitted or conditional use in certain zones.

well aware of the possibility that townships, through unrestricted use of their zoning ordinances, would be in a position to preclude such necessary, but perhaps locally undesired, uses.

RELIEF

Washtenaw County requests that the decision of the Court of Appeals be reversed.

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Date: 6/21, 2002

EXHIBIT A

House
Legislative
Analysis
Section

Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

COUNTY COMMISSIONERS: POWERS AND VOTING REQUIREMENTS

House Bill 4503 (Substitute H-1)
First Analysis (12-10-97)

Sponsor: Rep. Robert Brackenridge
Committee: Local Government

THE APPARENT PROBLEM:

County officials have complained that the 1851 act that spells out the powers of county boards of commissioners contains outdated provisions and antiquated language that can make it hard to interpret. It also is organized so that one section enumerates the powers of the boards and another separate section lists the powers that can only be exercised by a two-thirds vote. A representative of counties has said that in reading the statute, county officials often miss this provision regarding two-thirds voting and instead use a majority vote instead. Legislation has been introduced to modernize the act somewhat and to remove the section containing the two-thirds voting requirements.

THE CONTENT OF THE BILL:

Public Act 156 of 1851 defines the powers and duties of the county boards of commissioners, and Section 12 requires that certain specified powers can only be exercised with a two-thirds vote of the members elected to the board. House Bill 4503 would repeal Section 12. Instead, questions arising at meetings of the county board would be determined by a majority of those present, except that the final passage or adoption of a measure or resolution or the allowance of a claim against the county would be determined by a majority of members elected and serving. Further, the bill would specify that a county board could require in its bylaws that the votes of two-thirds of the members present or a majority of members elected and serving, whichever was greater, was required on final passage or adoption of a non-agenda item.

The repeal of Section 12 would mean that a two-thirds majority vote would no longer be required for:

-- determining the site of a county building;

-- erecting the necessary buildings for jails, clerks' offices, and other county buildings, and prescribing the time and manner of erecting them;

-- authorizing the making of a new tax roll; and

-- representing the county and being responsible for the care and management of the property and business of the county if other provisions are not made.

The bill also would amend the provision granting a county board the power to borrow or tax to specify that the exercise of such an authority would be subject to any voting requirement provided by the law authorizing the borrowing or tax if it was different from the general voting requirements in the act.

The bill also would delete several provisions considered outdated. It would delete provisions specifically granting a county the power to purchase property for the support of the poor and for a poor farm and the power "to abolish or revive the distinctions between township and county poor." It would delete language granting a county board the power to authorize a township, with the approval of township voters, to borrow money or raise taxes for road and bridge projects. It also would remove a provision granting a county board the power to remove or designate a new site for a county building "required to be at the county seat" and to remove or designate a new site for a county infirmary or medical care facility. Instead, the general provision granting a county board the power to determine the site of a county building would be amended to add the power to remove or designate a new site for a county building and would specify that the exercise of that authority would be subject to any requirements of law that the building be located at the county seat.

Public Act 156 does contain provisions requiring a two-thirds vote in cases not addressed by Section 12, and those remain unchanged by the bill. One deals with removing an officer of the county who neglects or refuses to make a report or give a bond; another deals with receiving and allowing accounts at the October session.

MCL 46.3 et al

House Bill 4503 (12-10-97)

BACKGROUND INFORMATION:

The House passed a bill with the same provisions, House Bill 5701, during the 1995-96 legislative session.

FISCAL IMPLICATIONS:

The House Fiscal Agency has said the bill would have no direct fiscal impact on the state or local units of government. (11-3-97)

ARGUMENTS:

For:

The bill updates and modernizes somewhat the 1851 act that specifies the powers of county boards of commissioners and removes a section that lists the powers that can only be exercised by two-thirds vote. The section being repealed is said to be often overlooked and outdated. Most of those powers are routine matters for county boards and should not require a two-thirds vote. Other governmental units, it is said, conduct such business by simple majorities. The bill would allow commissioners to conduct their business mostly by majority vote, except when board bylaws required otherwise or when other related tax and borrowing acts required otherwise.

POSITIONS:

The Michigan Association of Counties has indicated support for the bill. (11-4-97)

Analyst: C. Couch

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent

EXHIBIT B

PUBLIC CORPORATION Law Quarterly
Newsletter of the Public Corporation Law Section of the State Bar of Michigan
Fall 2001, No. 10

When is a Governmental Unit Exempt from or Subject to Local Zoning Regulations?

Robert L. Brackenbury[1]

I. Introduction

The title refers to the question posed by the Michigan Court of Appeals in June 2001. In a case of first impression, the Court of Appeals issued a ruling in *Pittsfield Charter Township v. Washtenaw County*[2] that county governments are subject to and must comply with township zoning regulations in the location of county government buildings.

The issue of intergovernmental relations and immunity from local zoning regulations is actually much more expansive than relations between a county and a township. In fact, it is an issue that courts frequently struggle to resolve. It often involves various state agencies, public authorities and utilities, school districts, public universities, and other types of governmental entities that need to expand infrastructure and build new facilities in the realm of local governments.[3]

Governmental immunity from zoning is a topic that surfaces often enough that the court system has been routinely addressing the subject. As recent as August of this year, the Court of Appeals issued a ruling in *Charter Township of Northville v. Northville Public Schools*, finding that school construction projects are exempt from local land use regulations.[4] Michigan is not alone in this regard, as the issue remains at the forefront of governmental concerns nationally.[5]

This article begins in Part II by providing a brief description of zoning in general, followed by a discussion of intergovernmental zoning issues. Part III presents an extensive survey of the various judicial tests invoked to resolve zoning conflicts, starting with federal government applicability. This section then details the evolution from traditional tests to modern tests that determine governmental immunity from local zoning regulations. Part IV discusses the current law in Michigan regarding this topic, while revealing the complexities and varied fact patterns that Michigan courts have dealt with throughout the past several years. Finally, Part V concludes with a suggested approach of resolving cases where the legislative intent has not been clearly expressed.

II. Complexities of Zoning

A. Zoning In General

Restriction of the use of one's property to promote public welfare is an accepted principle of law. Such restrictions can be imposed by the use of zoning ordinances. These ordinances typically divide areas of land within a municipality for the purpose of controlling the use of the land and the construction of buildings. The authority to zone is usually derived from a constitutional grant of power, which is then delegated by the legislature to municipalities. The U.S. Supreme Court first sanctioned the use of a comprehensive zoning ordinance in 1926 when it endorsed a government's right to zone in *Village of Euclid v. Ambler Realty Company*.[6] The Court upheld the constitutionality of zoning as a valid exercise of the police power to the extent that the restriction on land use is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[7]

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The use of the term "local government" can vary by state. The Michigan Constitution describes local governments as "counties, townships, cities and villages."[8] The authority for zoning at the local government level in Michigan is derived from separate enabling legislation. The City and Village Zoning Act was adopted in Act 207 of 1921,[9] the Township Zoning Act in Act 184 of 1943,[10] and the County Zoning Act in Act 183 of 1943.[11] Each act provides the relevant local government bodies with the police power to enact zoning ordinances that must be reasonably related to the promotion of public health, safety, and general welfare.[12]

B. Implications of Governmental Priority

Local government resistance to zoning immunity by other echelons of government does not always originate from the local government body. Rather, local residents most closely impacted by the incursion often assert the local government's rights in legal action. After all, who would particularly find a sewage treatment plant or state prison as the ideal residential neighbor? Furthermore, a local government's comprehensive land use plan is designed with extensive planning. Deviations from this plan, such as when a state agency proposes an industrial use inconsistent with residential zoning, can create havoc in the overall scheme of community planning. After all, one of the goals of planning at the local level is to predict and guide change within the community.[13]

On the other hand, it is difficult to dispute the need for state and other government facilities, such as public park space, police facilities, airports, and other significant public interests. The inability to proceed with a legislative mandate in one local government region will result in a frustration of purpose. The consequence will be relocation to other less efficient jurisdictions until a willing entity is found. Local governments should not be allowed to dictate statewide public policy, which can result in an outright exclusion.

III. Judicial Tests for Governmental Immunity

A. Federal Government

In general, no judicial test is required to establish if the federal government is subject to local zoning regulations. This is because federal activity normally is not subject to local regulation, thus benefiting from absolute immunity.[14] For instance, while dismissed for other reasons, Ann Arbor Township realized this in 1950 when it filed suit against the United States government in an attempt to stop the construction of a Veteran's Administration hospital on the grounds that it was in violation of a local zoning ordinance.[15] Furthermore, even when no federal land is at issue, local zoning ordinances cannot interfere with federal regulations. A City of Dearborn ordinance that attempted to place restrictions on the use of residential satellite antennas was deemed preempted by a Federal Communications Commission regulation prohibiting the enforcement of local zoning ordinances that unduly interfere with satellite antennas.[16]

The preemption from local zoning for federal activities extends to private land that the federal government leases.[17] For example, a frequent practice of the U.S. Postal Service is to lease rather than own its facilities. This has led to several attempts by local governments to impose zoning regulations, but to no avail.[18]

The issue is less clear when the federal government is the lessor of federal land to a private entity, where no case law is directly on point.[19] However, the U.S. Supreme Court has suggested that the issue may turn on whether the private entity is performing an activity not normally carried out by the federal government. In supporting the imposition of a state tax against the private activities of a government contractor operating on federal land, the U.S. Supreme Court upheld a Michigan Supreme Court decision, noting that "the case might well be different if the Government had reserved such control over the activities and financial gain of [the contractor.]"[20]

B. Traditional Tests

Struggling for an optimum method of dealing with intergovernmental disputes, several judicial tests were developed nationally by courts seeking to categorize competing governmental interests. The outcome led to three traditional legal tests for limited governmental immunity. These are known as the Superior Sovereign Test, the Eminent Domain Test, and the Governmental-Proprietary Test. Each test met with varied levels of criticism, and their use today has essentially been relegated as a limited supplement to complement more modern tests.[21] A review of the traditional tests is necessary to fully understand the evolution of modern judicial analysis.

1. Superior Sovereign Test

The superior sovereign test has been almost universally rejected by modern courts.[22] It involves the establishment of a hierarchical ranking between competing governmental entities. The result is usually clear, although not necessarily rational. The determination under this test will be that a state or state agency would prevail over a county, township or city, and a county over a township or city. Michigan courts previously used a limited form of this test, holding that "as a general rule townships do not have the authority to enact zoning ordinances affecting property owned by the state."[23]

Criticism of this test includes the fact that home-rule states delegate local government powers by state constitution rather than legislation. When the local power is derived from such a superior source, it becomes questionable why the power to zone would not be superior to a state agency that originated by statute.[24] Furthermore, in non-home-rule states, local governments derive their zoning power by statute, thus acting relatively equivalent to a state agency. This brings into question why a state-wide agency should be given superiority over a local subdivision of the state.[25] Noting the inherent conflicts of the test, the Indiana Supreme Court rejected it in favor of another test:

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> The superior sovereign test presents the difficulty of attempting to establish a meaningful hierarchical ranking. Since a municipal corporation is an agent of the state whose zoning power is governed by the legislature, its interest in enforcing this power is equal to the state agency's interest in performing those functions for which it was formed. Attempting to label one government entity "superior" merely begs the question of which agent of the sovereign should prevail on the issue of land use.[26]

Finally, in addition to the hierarchical difficulties in ranking governmental entities, there is no assurance that the entity representing the broader constituency also represents the greater social utility.[27] A state agency that implements a policy state-wide may fail to consider that its applicability might not be uniform in all townships, cities, or villages.

2. Eminent Domain Test

Equally limited in modern jurisdictional application is the eminent domain test. This judicial test is based on the notion that if the imposing governmental entity possesses the power of eminent domain, then the local zoning power will be inapplicable, even if the power of eminent domain was not used to acquire the land.[28] The mere possession of the power is presumed inherently superior to the exercise of the zoning power and hence enough to acquire immunity.[29]

Presumably, if both governmental units possess the power of eminent domain, courts would look to the derivation of this power (constitution versus statute) to assess priority. It is questionable how this test can be rationalized if both entities derive their power from the same source. Critics of this test have pointed out that both the power of eminent domain and zoning laws normally are legislative creatures, and neither should be afforded superiority unless it is the explicit intent of the legislature.[30] Moreover, it has been noted that there is nothing inherent in this power that should make it automatically exempt from zoning.

Michigan courts have touched on the issue of eminent domain relative to considering immunity from local zoning regulations, but on a limited basis.[31] Given that it is the eminent domain authority and not the actual exercise of the authority that is controlling, this test would prove troublesome in Michigan given that most local governmental entities have been granted some form of condemnation power.[32]

3. Governmental-Proprietary Test

The governmental-proprietary test attempts to make a distinction based on the relevant activity at hand. If the activity is deemed a governmental function, then the entity acting in its governmental capacity will be immune from local zoning regulations. However, if the activity is judged to be proprietary in nature, the entity must comply with the regulations. This test evolved out of the tort sovereign immunity distinction that a governmental function is aimed at advancing public policy and a proprietary function is based on corporate profit-making motives.[33]

On its face, the test appears to be straightforward. Nevertheless, criticism with this test is rooted in its derivation from tort law and the inherent difficulties associated with classifying governmental functions. The results are often inconsistent and unpredictable.[34] The operation of county jail facilities, a hospital authority, and a multipurpose village building are examples of activities that have been recognized as governmental in nature.[35] On the other hand, the erection of a water tower in a primarily residential district and the construction of an electrical substation have been ruled proprietary.[36]

Michigan courts have previously utilized the governmental-proprietary test, most notably in a case where the City of Benton Harbor, engaged in the construction of a water tower, was held to be acting in a proprietary or private capacity and thus subject to its own zoning regulations.[37]

C. Modern Tests

As indicated previously, the use of traditional judicial tests for governmental immunity from local zoning regulations has declined significantly, mainly due to their significant shortcomings. These tests tend to place zoning interests consistently in a secondary position. As one commentator observed:

> The [traditional] tests share the same basic characteristic: the application of conclusory labels that do not reflect the relevant factors involved in an intergovernmental dispute. In addition, the tests dichotomize the decision in any given case as a choice between unbridled intruder immunity and absolute host control. In doing so, the tests fail to facilitate the compromise that could be achieved. (emphasis added.)[38]

This dissatisfaction has led many jurisdictions to reject the traditional tests in favor of a more modern analysis that attempts to balance competing governmental interests.

1. Legislative Intent Test

Nationally, several state legislatures have enacted statutes that clearly identify which governmental entities are exempt from or subject to local zoning regulations. Some have enacted specific statutory exemptions on a piecemeal basis that are limited to certain contexts. Still other legislatures have not addressed the issue at all or have used language that requires courts to construe the statutory terms in an effort to determine what the legislature intended.[39] The legislative intent test is designed to elicit the intent of the legislature when statutory language is ambiguous by looking at all statutes relevant to the situation at hand. If the statute is clear, the court will not offer a value judgment on the public interests served but rather

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rule as indicated.[40] The imposing governmental entity is subject to local zoning regulations if the legislative intent cannot be deduced.

Criticism of this test is based on its reliance on legislative action. When a state, such as Michigan, lacks a concise statute that identifies the applicability of zoning regulations, interpretation becomes difficult. Various statutes, often enacted at different times, cover a multitude of state and governmental entities. As a consequence, courts can yield divergent results, often between parallel government entities empowered by different statutes. By not considering the effects of a particular statutory interpretation, this test pleads for some form of a balancing deliberation. The legislative intent test is the current law in Michigan, as discussed more fully infra.

2. Balancing of Interests Test

The most common test applied in other jurisdictions is the balancing of interests test. This test seeks to elicit legislative intent by considering several factors. What makes it distinctive from the other tests is that no single factor is determinative. An exception is made when clear statutory language is present to identify local zoning applicability. In the absence of such language, the test considers factors that result in a case-by-case value judgment. The balancing of interests test derives its origin from a 1972 New Jersey case, Rutgers, The *State University v. Piluso*.[41] The analysis in this case has been adopted in various forms by several jurisdictions.

In Rutgers, the university sought to build apartments to alleviate a student housing shortage that was restricting its enrollment growth. However, the township where the university owned land had a zoning ordinance that limited the maximum number of housing units to those already in existence. The township rejected the university's permit and variance efforts, specifically for what was identified as "an astonishing point of view that in its opinion [the township proposes that] public collegiate education in this state needs more classrooms rather than additional student housing facilities."[42]

The university brought suit asserting immunity from the township's zoning ordinances. After rejecting the traditional tests, the New Jersey Supreme Court held that the true test of immunity is the legislative intent with respect to the particular agency or function at stake.[43] To derive this intent, the court noted the following:

> That intent, rarely specifically expressed, is to be divined from a consideration of many factors, with a value judgment reached on an overall evaluation. All possible factors cannot be abstractly catalogued. The most obvious and common ones include [1] the nature and scope of the instrumentality seeking immunity, [2] the kind of function or land use involved, [3] the extent of the public interest to be served, [4] the effect local land use regulation would have upon the enterprise concerned, and [5] the impact upon legitimate local interests. (emphasis added.)[44]

The court also indicated that the uniqueness of each case will determine which factors will be more influential than others. As a true balancing of interests test, the New Jersey court took care to observe that the test should not "be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests."[45] The court also urged that the imposing governmental entity should consult with local authorities and attempt to minimize conflicts.

After completing its analysis, the court found for the university, holding that "there can be little doubt that, as an instrumentality of the state performing an essential governmental function for the benefit of all people of the state, the Legislature would not intend that its growth and development should be subject to restriction or control by local land use regulation."[46] The New Jersey court was obviously troubled by the local government's attempt to assert its public policy views on the state.

The advantage this test offers is its flexibility and ability to consider the ramifications of a decision from both governmental entities' perspective. However, the test is limited to those situations where it is impossible to deduce the legislative intent from statutory language. Another disadvantage is the requirement for a subjective judicial assessment in the decision-making process.[47] At least one court has rejected the balancing test after using it for several years, expressing that the test creates "unauthorized judicial lawmaking that produced too much uncertainty."[48]

3. Procedural Test

Searching for a method to limit the uncertainties associated with a subjective balancing test, some jurisdictions have modified tests to require certain steps before the "balancing of interests" process is considered. These procedural tests require that the imposing governmental entity first attempt a good-faith effort to comply with the local zoning ordinance before the court will consider the case.[49] Only after attempts to comply with the zoning have failed will a court utilize the balancing methodology. This practical approach eliminates the need for judicial review if the imposing entity can reasonably comply with local regulations.[50] Consistent with the other modern tests, the presence of absolute statutory language is determinative in establishing immunity.

One of the leading cases that have adopted a procedural test is from the Indiana Supreme Court in City of *Crown Point v. Lake County*, holding that:

> When a zoning authority has denied an intruding government's request for approval of a given land use, an appeal can lie to the courts, which will balance the interests to determine which must prevail. Factors to be considered include the propriety of the land use, such as the economic and environmental impact on the area, the kind of function or land use involved, the availability of alternative locations, and any attempts to minimize detriments to adjacent

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> landowners, as well as a consideration of competing interests, such as the nature and scope of the intruding government unit, the essential use to the local community and the broader community, the need for the specific site as compared to the adverse impact, the social utility of the proposed use, and the possible frustration of a government function. These are the sort of decisions assigned to local executive and legislative bodies. Where their determinations are irreconcilable, the legislature has provided for a review of the zoning decision by the judiciary.[51]

By insisting that the imposing governmental entity participate in the local government's proceedings, these jurisdictions are attempting to maximize harmony between governmental units.[52] Moreover, the process ensures that the imposing entity consider local government concerns relative to the proposed activity.[53] The trend of adopting a modified version of the balancing of interests test has gained momentum in Midwestern states.[54]

IV. Relevant Michigan Case History

A. Michigan Supreme Court

While the issue of governmental immunity has arisen frequently in the Michigan Court of Appeals, only three recent Michigan Supreme Court cases are on point.

1. Dearden v. City of Detroit

Dearden is the leading case in Michigan on the issue of governmental immunity from local zoning regulations.[55] It involved the proposed use of a former convent as a neighborhood rehabilitation center for the State Department of Corrections, which had leased the property from the archdiocese. The Detroit Board of Zoning Appeals denied the State's request for a variance. In its decision, the Michigan Supreme Court took pains to extensively review the inconsistencies in state judicial decisions that left the issue of governmental immunity unresolved. The Court also clearly discounted the three traditional tests as "largely unsatisfactory."[56]

Adopting the legislative intent test as law in Michigan, the Court ruled "[w]e hold today that the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances."[57] The Court continued on to characterize the issue as one "not of absolute immunity, but rather of legislative intent."[58]

In ruling for the State, the Court found language in legislation establishing the Department of Corrections that gave the agency "exclusive jurisdiction" over penal institutions. It found a clear expression of legislative intent that the Department of Corrections should be free from local controls in establishing and operating penal institutions. The Court was careful to also examine the applicable zoning enabling act to determine if there was any legislative intent to subject the Department's exclusive jurisdiction to local regulations. Finding none, the Court recognized the public policy issue at stake should the local zoning regulations apply:

> If the department were subject to those ordinances, the underlying policies of the general correctional system could be effectively thwarted by community after community prohibiting the placement of certain penal institutions in appropriate locations. A careful reading of the statute establishing the department evidences a contrary legislative intent.[59]

2. Township of Burt v. Department of Natural Resources

Burt gave the Michigan Supreme Court an opportunity to further clarify the Dearden court's legislative intent test and to establish guidelines for discerning the legislative intent from statutes.[60] The case involved attempts by Burt Township to require the Department of Natural Resources (DNR) to comply with local zoning regulations in the construction of a public access boat ramp. Ruling for the township, the Court conducted an exhaustive analysis of the applicable statutes and found nothing that would establish a clear expression of legislative intent to exempt the DNR's activities from the Burt Township zoning ordinance.[61]

The Court provided an excellent guide for subsequent courts (and the Michigan Legislature) to use when deducing the legislative intent from statutes:

> While the presence of such terms as "exclusive jurisdiction" certainly would be indicative of a legislative intent to immunize the DNR from local zoning ordinances, we decline to require that the Legislature use any particular talismanic words to indicate its intent. The Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive. Whatever terms are actually employed by the Legislature, our task is to examine the various statutory provisions at issue and attempt to discern the legislative intent in enacting them.[62]

The Court determined that language in the DNR's enabling statute that granted it the "power and jurisdiction" to manage land within its control was not sufficient to grant it "exclusive jurisdiction."[63]

3. Byrne v. Department of State Police

Byrne is notable not for the fact that the Michigan Supreme Court reaffirmed the Burt and Dearden cases, but rather for its display of a well-drafted statute that allows local government input while still providing a state agency with exclusive jurisdiction.[64] This case involved the State Police's installation of a new statewide communication system and the opposition by Ada Township residents to the plans for a communications tower site.

The applicable statute charged the State Police with the task of constructing the Michigan Public Safety Communications System (MPSCS).[65] In doing so, it required that local governments receive notification of site selection. If the site did not comply with zoning,

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the local unit would have thirty days to either grant a special use permit or propose an equivalent site. Otherwise, the State Police could proceed with construction.[66]

The Court found unequivocal language that "the clear import of the Legislature's enactment of 1996 PA 538...was to exempt the State Police from local zoning ordinances so that MPSCS could effectively and efficiently be constructed."[67] Similar to comments expressed by the Dearden court, the Byrne court summarized the rationale behind the Legislature's grant of exclusive jurisdiction:

> Indeed, if the State Police were subject to the provisions in the township zoning ordinances, the underlying purpose of the MPSCS could be effectively thwarted by local government entities imposing unreasonable restrictions to prohibit construction of the towers in appropriate locations.[68]

4. Summary of the Michigan Legislative Intent Test

The legislative test in Michigan can be concisely summarized as follows:

> a) The court will look for language in the imposing governmental entity's applicable statute that clearly states the entity has "exclusive jurisdiction" over local zoning regulations.
>
> b) If explicit language is not available, then the court will look for language which conveys that the clear intention of the legislature was to grant exclusive jurisdiction. The intent will be derived from the enabling and applicable zoning statutes of both the imposing entity and the local government.
>
> c) If legislative intent to immunize the imposing governmental entity cannot be found, then the local zoning regulations will prevail. No consideration will be given to the merits of either side.

Hence, this strict use of the legislative intent test by Michigan courts does not allow for consideration of the virtues of the imposing project, nor does it take into account the concerns expressed at the local level. The legislative intent, or the lack thereof, is the exclusive controlling factor.

An interesting aspect in the evolution of Michigan's legislative intent test must be pointed out. When the Dearden court first expressed its adoption of the legislative intent test, it implied in a footnote that it was adopting this test based on a similar test from Rutgers, *The State University v. Piluso*.[69] However, Rutgers, as noted supra, involved a test that sought to determine legislative intent first by looking at statutory language. If the language is unclear, the court utilizes a balancing of interests test, taking into account several factors.

Did the Dearden court actually intend to adopt the balancing of interests test? There was no need to proceed into a balancing analysis in Dearden. The court found explicit language that gave the Department of Corrections exclusive jurisdiction over the establishment of state penal institutions. A decade later, when a new Supreme Court issued a ruling in Burt, the interpretation was that governmental immunity would be limited to the legislative intent gleaned from a statute. If the statute in Dearden was ambiguous, the current test in Michigan could instead require a balancing of interests.

B. Michigan Court of Appeals

Following the direction of the Michigan Supreme Court, the Court of Appeals has issued several opinions on governmental immunity cases utilizing the legislative intent test.

1. Pittsfield Charter Township v. Washtenaw County

In June 2001, the Court of Appeals issued a ruling in *Pittsfield Charter Township v. Washtenaw County*, holding that the county was subject to township zoning regulations in the location of county government buildings.[70] The case stemmed from the county's plan to construct a homeless shelter on land it owned in the township. The township objected, noting that the site in question is locally zoned for industrial use, which excludes residential uses such as the homeless shelter.

In a case of first impression, the court expressed the difficulty it had in determining legislative intent:

> [O]ur job here is particularly complex because there is no legislative pronouncement strictly on point. That is, the Legislature has not promulgated a rule which says that a county is subject to or exempt from township zoning laws (or other laws for that matter). In some areas, our Legislature has spoken directly and clearly on the subject of whether certain specific state agencies are subject to or exempt from zoning ordinances, but not here.[71]

After reviewing case history and analyzing several zoning and land use statutes, the Court of Appeals determined that it could not locate any clear legislative intent that the county should be immune from the township's zoning regulations. The Court of Appeals considered provisions of the County Commissioners Act,[72] the County Zoning Act,[73] the Township Zoning Act,[74] and the Township Planning Act.[75] It reached the conclusion that the Legislature intended counties to be subject to township zoning regulations.[76]

An application for leave to appeal to the Michigan Supreme Court was submitted by Washtenaw County and a decision on whether the Supreme Court will hear the case is pending.

2. Northville Township v. Northville Public Schools

A recent August 2001 case, *Northville Township v. Northville Public Schools*, involved the Public School's attempts to construct a new high school.[77] The Township, along with several residents, insisted that the site plans must conform to local zoning regulations. The Court of Appeals found compelling statutory language that the Legislature, by enacting the Revised School Code,[78] in-

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tended to grant immunity to public school districts for construction projects:

> In the present case, the Legislature granted the superintendent of public instruction "sole and exclusive jurisdiction" over the review and approval of site plans for school buildings. This language satisfies Burt's requirement that the Legislature employ terms that convey a clear intention to grant a governmental unit exclusive jurisdiction. In fact, we fail to see how the Legislature's intent could have been more clearly expressed.[79]

The Northville case is an interesting example of how the Legislature is reacting to the legislative intent test. A 1982 Court of Appeals case, *Cody Park v. Royal Oak School District*, reached the opposite conclusion in that no legislative intent was found in the School Code of 1976.[80] The Michigan Legislature has obviously expressed its desire to exempt public schools from certain local zoning regulations in the Revised School Code.

A distinction between the Cody Park and Northville Township cases should be noted. Cody Park involved the use and location of public school property, while the issue before the Northville Township court dealt with more limited regulatory issues such as construction and site plan requirements. The Court of Appeals used rather expansive language in the Northville Township decision, inferring that its decision extends to all local land use regulations. The case's applicability to situations where a local government's zoning classification prohibits the erection of a public school remains to be seen.

3. Other Recent Court of Appeals Decisions

A 1996 Court of Appeals case, *Township of Addison v. Dep't of State Police*, upheld an injunction against the State Police that required compliance with local zoning in the construction of State Police radio towers.[81] This case has effectively been "legislatively overruled" by statutory amendments, as discussed in the Byrne case supra.

The Court of Appeals, in *Nolan Brothers of Texas, Inc. v. City of Royal Oak*, found no legislative intent in statutes pertaining to the Michigan Department of Transportation to permit a preemption of zoning regulations when the land is to be sold to private parties.[82]

In *Bingham Township v. RLTD Railroad Corporation*, the Court of Appeals held that township zoning ordinances were preempted by the Michigan Trailways Act, thus removing the township from jurisdiction over rail-to-trail programs.[83]

Ruling for the township in *Capital Region Airport Authority v. Dewitt Township*, the Court of Appeals found no legislative intent in the aeronautics code that would give airport authorities exclusive jurisdiction over the sale or lease of airport land in conjunction with non-aeronautical purposes.[84]

V. CONCLUSION - The Need for Balance

When the Legislature has enacted a statute that explicitly and clearly grants governmental entities immunity from local zoning regulations, the decision of the courts is clear and should not be questioned. The Legislature is accountable for its actions and is empowered to make them.

However, when statutory guidance is lacking, the courts need to consider more than the "all or nothing" approach evident in the legislative intent test. Ascertaining legislative intent can be difficult, especially since legislative foresight of intergovernmental conflict may not be present. Various statutes, often enacted at different times, cover a multitude of state and governmental entities. As a consequence courts can yield divergent results, often between parallel governmental entities authorized by different statutes. Without considering the significance of a particular statutory interpretation, the legislative intent test begs for a balancing deliberation.

Michigan would be well served by a comprehensive statute that categorizes intergovernmental relationships and sets forth the parameters for local government zoning immunity. However, this type of legislation may not be realized. In its place, the Michigan Supreme Court should consider enhancing the current legislative intent test to allow for a balancing of interests, as the Dearden court alluded. The test used by Indiana courts would be a good model for consideration. Concerns about inserting a subjective aspect into legal analysis can be alleviated by requiring intergovernmental notice and cooperation as a first step.

Zoning conflicts will continue to surface between units of government at the local level. A test that not only encourages, but also mandates intergovernmental cooperation has the potential to resolve conflicts before they reach the court system.

Endnotes

[1] Robert L. Brackenbury is a former Trustee in Pittsfield Charter Township and is currently an attorney at Eastern Michigan University and in private practice, specializing in business transactions, real estate, and construction law. He is a cum laude graduate with BS and MA degrees from Eastern Michigan University and a graduate of Wayne State University Law School.

The views expressed in this article are independent and not necessarily those of any other individual or entity.

[2] Pittsfield Charter Township v. Washtenaw County, No. 219480, 2001 Mich. App. LEXIS 120 (Jun. 15, 2001).

[3] *See generally* 83 Am. Jur. 2d, Zoning and Planning, §§407-434.

[4] Charter Township of Northville v. Northville Public Schools, No. 219124, 2001 Mich. App. LEXIS 168 (Aug. 17, 2001).

[5] *See generally* Applicability of Zoning Regulations to Governmental Projects or Activities, 53 ALR 5th 1, §§1-27. For a concise summary of relevant Michigan cases, see Mich. Law and Practice, 17 Municipal Corporations §201; Mich. Civ. Jur. – Application of Local Zoning Ordinances to State Property and Activities §6, Vol. 25 (2001 Rev).

[6] 272 U.S. 365 (1926).

[7] *Id.* at 395.

[8] M.I. Const. art. VII, §29.

When is a Governmental Unit Exempt from or Subject to Local Zoning Regulations?

[9] MCL 125.581 et seq.

[10] MCL 125.271 et seq.

[11] MCL 125.201 et seq.

[12] *See, e.g.,* MCL 125.203; MCL 125.273 ("The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare...").

[13] *See* Clan Crawford, Jr., Michigan Zoning and Planning, 3 (3d ed. 1988) (discussing the community planning process).

[14] Patrick J. Rohan, Zoning and Land Use Controls, §40.01[1] (2001).

[15] Ann Arbor Township v. United States, 93 F. Supp. 341 (1950).

[16] Loschiavo v. City of Dearborn, 33 F. 3d 548 (1994).

[17] Rohan, *supra* note 14, at §40.01[1](c).

[18] *Id.*

[19] *Id.*

[20] *See* U.S. v. Township of Muskegon, 355 U.S. 484, 486 (1958) (sustaining the decision of the Michigan Supreme Court that allowed the township to collect the tax).

[21] 83 Am. Jur. 2d, Zoning and Planning, at §409.

[22] Rohan, *supra* note 14, at §40.01[1](e).

[23] Haring v. Cadillac, 35 Mich. App. 260, 262 (1971) (citing State Highway Commissioner v. Redford Township, 4 Mich. App. 223 (1966)).

[24] Adelfio, Governmental Immunity From Zoning, 22 B.C.L. Rev. 783, 790-791 (1981).

[25] *Id.*

[26] *See* City of Crown Point v. Lake County, 510 N.E. 2d 684 (Ind. 1987) (quoting 8 McQuillan, Municipal Corporations, §§25.15, at 20 (3d ed. Rev'd. 1983), and later applying a balancing test).

[27] Adelfio, *supra* note 24, at 791.

[28] Note, Governmental Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. 869, 874 (1971).

[29] *Id.*

[30] *See* Comment, Balancing Interests to Determine Governmental Exemption From Zoning Laws, 1973 U. Ill L. F. 125, 131 (1973).

[31] *See* In re Petition of Detroit, 308 Mich. 480 (1944) (permitting a city to condemn lands within a township for the creation of an airport); *see also* Johnson v. Fred L. Kircher, 327 Mich. 377 (1950) (allowing a city to create a public alley based on its power of eminent domain).

[32] *See, e.g.,* MCL 213.21-25 ("counties, cities, villages, boards, commissions and agencies made corporations for the management and control of public business and property"); MCL 125.286 ("A township may acquire...by condemnation...for the removal of nonconforming uses.").

[33] Adelfio, *supra* note 24, at 792.

[34] *Id.* at 793.

[35] *See generally* 53 ALR 5th 1, §11.

[36] *Id.*

[37] *See* Taber v. City of Benton Harbor, 280 Mich. 522 (1937) (city residents claimed defendant city must comply with city ordinances in the placement and construction of a water works system); *see also* Mainster v. West Bloomfield, 68 Mich. App. 319 (1976); Stiffler v. Traverse, 11 Mich. App. 93 (1968) (city must obey its own zoning ordinance in constructing an addition to a city-owned power plant).

[38] Laurie Reynolds, The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing, 71 Minn. L. Rev. 611, 624 (1987).

[39] *See generally* 53 ALR 5th 1, §§24-25.

[40] *Id.*

[41] Rutgers, The State University v. Piluso, 60 N.J. 142 (1972).

[42] *Id.* at 150.

[43] *Id.* at 152.

[44] *Id.* at 152-153.

[45] *Id.*

[46] *Id.* at 153.

[47] Reynolds, *supra* note 38, at 627.

[48] Commonwealth of Pennsylvania, Dept. of Gen. Servs. v. Ogontz Area Neighbors Ass'n, 483 A. 2d 448 (Pa. 1984).

[49] Rohan, *supra* note 14, at §40.01[2](g).

[50] *Id.*

[51] City of Crown Point v. Lake County, 510 N.E.2d 684, 690-691 (Ind. 1987)

[52] Reynolds, *supra* note 38, at 634.

[53] *Id.*

[54] *See, e.g.,* Brownfield v. State, 63 Ohio St. 2d 282 (1980); Wilmette Park Dist. v. Village of Wilmette, 112 Ill. 2d 6 (1986), Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102 (1978); *see also* Orange County v. City of Apopka, 299 So. 2d 652 (Fla. 1972).

[55] Dearden v. City of Detroit, 403 Mich. 257 (1978).

[56] *Id.* at 261.

[57] *Id.* at 264.

[58] *Id.* at 265.

[59] *Id.* at 267.

[60] Township of Burt v. Dep't of Natural Resources, 459 Mich. 659 (1999).

[61] *Id.* at 671.

[62] *Id.* at 669.

[63] *Id.* at 669-670.

[64] Byrne v. Dep't of State Police, 463 Mich. 652 (2001).

[65] 1996 PA 538, MCL 28.281.

[66] Byrne, 463 Mich. 652, at 654.

[67] *Id.* at 661 (quoting 239 Mich. App. at 574).

[68] *Id.*

[69] Dearden, 403 Mich. 257, at 264 (note 4).

[70] Pittsfield Charter Township v. Washtenaw County, No. 219480, 2001 Mich. App. LEXIS 120 (Jun. 15, 2001).

[71] *Id.* at *6.

[72] MCL 46.11 et seq.

[73] MCL 125.201 et seq.

[74] MCL 125.271 et seq.

[75] MCL 125.321 et seq.

[76] Pittsfield Charter Township, No. 219480, 2001 Mich. App. LEXIS 120, at *6-7.

[77] Charter Township of Northville v. Northville Public Schools, No. 219124, 2001 Mich. App. LEXIS 168 (Aug. 17, 2001).

[78] MCL 380.1263(3).

[79] Charter Township of Northville, No. 219124, 2001 Mich. App. LEXIS 168, at *10.

[80] Cody Park v. Royal Oak School District, 116 Mich. App. 103, (1982).

[81] Township of Addison v. Dep't of State Police, 220 Mich. App. 550 (1996).

[82] Nolan Brothers of Texas, Inc. v. City of Royal Oak, 219 Mich. App. 611 (1996).

[83] Township of Bingham v. RLTD Railroad Corporation, 228 Mich. App. 154 (1998).

[84] Capital Region Airport Authority v. Dewitt Township, 236 Mich. App. 576 (1999).